ASSOCIATION OF BANK OFFICERS, PENINSULAR MALAYSIA *a*

v.

MALAYAN COMMERCIAL BANKS ASSOCIATION

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
AJAIB SINGH SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-2-89] *b*
22 AUGUST 1990

CIVIL PROCEDURE: *Industrial Court - Interpretation of Award and collective agreement - Appeal for leave - Certiorari and mandamus to High Court - Whether acted with and within jurisdiction - Prima facie not frivolous or vexatious - Sections 33, 52 Industrial Relations Act 1967.* *c*

The appellants, pursuant to s. 33(1) of the Industrial Relations Act 1967 (the Act), applied for the interpretation of Article 34 of Industrial Court Award No. 54/81 and Article 31 of the 1984 collective agreement. At the date of hearing, the appellants' Counsel as a preliminary issue drew the Courts' attention to s. 33(5) of the Act. The appellant's application was then struck off *vide* Industrial Court Award No. 234/88. *d*

The appellants then applied to the High Court for leave to apply for an order of *certiorari* to quash the Industrial Court Award No. 234/88 and for an order of mandamus directing the Industrial Court to hear and determine, according to law, the appellants' initial application by a different Division of the Industrial Court. The High Court dismissed both applications, hence this appeal to the Supreme Court. *e*

Held:

[1] In making the said Award the Industrial Court did not take into account matters it ought to have taken into account and instead took into account matters it should not have taken into account and thereby had exceeded its jurisdiction and acted without jurisdiction. *f*

[2] In his grounds of judgment, the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. This was not the right approach when application for leave to apply for an order of *certiorari* is made. The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. *g*

[Appeal allowed.]

Legislation referred to:
Industrial Relations Act 1967, ss. 33(1), (3), (5), 52(2)
Rules of the High Court 1980, O. 53

For the appellants - B. Lobo; M/s. Lobo Associates *h*
For the respondents - R. Rajasingam; M/s. R.R. Singham

Editor's Note:
Industrial Court citation: [1988] 2 ILR 240 (September)
High Court citation: [1989] 1 CLJ (Rep) 316

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JUDGMENT

Ajaib Singh SCJ:

This was an appeal by the appellants against the decision of the High Court dated 7 December 1988 whereby the appellants' application for leave to apply for an order of *certiorari* to quash the Industrial Court Award No. 234 of 1988 dated 9 September 1988 was dismissed. Also dismissed by the High Court in the same application was for leave to apply for an order of *mandamus* that the Industrial Court hears and determines according to law the appellants' application for interpretation under s. 33(1) of the Industrial Relations Act 1967.

By way of *ex parte* notice of motion dated 7 October 1988 the appellants applied to the High Court seeking the following relief:

1. leave be granted to the applicants to apply for an order of *certiorari* to bring up and quash Industrial Court Award No. 234 of 1988 dated 9 September 1988.

2. leave be granted to the applicants for an order of mandamus directed to the Industrial Court to hear and determine according to law the applicants' application for interpretation dated 23 May 1988 under s. 33(1) of the Industrial Relations Act 1967 by a different Division of the Industrial Court from that which made the said Award No. 234 of 1988.

Section 33(1) of the Industrial Relations Act 1967 reads as follows:

> If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.

The grounds upon which the relief was sought were set out in the appellants' statement pursuant to O. 53 of the Rules of the High Court as follows:

> In making the said Award No. 234/88 the Industrial Court did not take into account matters it ought to have taken into account instead took into account matters it should not have taken into account and thereby exceeded and or acted without jurisdiction in particular:
>
> i misconstruing s. 33 of the said Act and not taking into account the provisions of s. 52(2) of the said Act
>
> ii misconstruing the provisions of s. 33(5) of the said Act
>
> iii not according the applicants the right to be heard on the merits or demerits of their application in compliance with the principles of natural justice as enshrined in s. 33(3) of the said Act before dismissing the said application.

In an affidavit filed by Hiew Sit Sang the general secretary of appellants states *inter alia* as follows:

> Pursuant to s. 33(1) of the Industrial Relations Act 1967 (hereinafter referred to as "the said Act") the applicants filed an application in the relevant statutory form for interpretation of Article 34 of the Industrial Court Award No. 54/81 and Article 31 of the 1984 Collective Agreement in both of which Award and Collective Agreement the applicants and the respondents were parties.
>
> Subsequently the respondents filed a statement in reply as directed by the Industrial Court.
>
> The matter was fixed for hearing on 7 September 1988 by the Industrial Court constituted by the learned President and a panel of 3 members. I was present in Court on 7 September 1988 with the applicants' Counsel.

At the commencement of proceedings on 7 September 1988 the applicants' Counsel pointed out to the Court about the provisions of s. 33(5) of the said Act as to constitution of the Court as a preliminary requirement to be complied with before the Court proceeded to hear the merits or demerits of the applicants' substantive application.

The Industrial Court took note of this preliminary issue and then after a brief submission by Counsel adjourned for about thirty minutes and ruled that the applicants' application is "struck-off".

I verily believe that when the applicants' Counsel asked for confirmation that the matter was being "struck-off", the learned President of the Court confirmed it and stated that the Court's written grounds for the ruling will be given in due course.

On 15 September 1988 the applicants' solicitors received the said written grounds of the Court as Award No. 234 of 1988 and dated 9 September 1988 dismissing the applicants' application.

I am advised in law and verily believe that in making the said Award the Industrial Court did not take into account matters it ought to have taken into account instead took into account matters it should not have taken into account and thereby exceeded its jurisdiction and or acted without jurisdiction in particular:

a misconstruing s. 33 of the said Act and not taking into account the provisions of s. 52(2) of the said Act.

b misconstruing the provisions of s. 33(5) of the said Act.

c not according the applicants the right to be heard on the merits or demerits of the application in compliance with the principles of natural justice as enshrined in s. 33(3) of the said Act before dismissing the said application.

Section 33(3) of the Industrial Relations Act reads as follows:

The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.

At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of *certiorari* ought to have been given. In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of *certiorari* is made. The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

For these reasons we were of the view that the appeal should be allowed and the appellants be given leave to apply for an order of *certiorari* to quash the Industrial Court Award No. 234 of 1980 dated 9 September 1988.

Also found at [1990] 2 CLJ 734